

**Education Audit Appeals Panel
State of California**

Appeal of 2006-07 Audit Findings 07-24,
07-26, 07-27, and 07-34 by:

Oakland Unified School District,
Appellant.

EAAP Case No. 10-04

OAH No. 2010050766

Decision on Finding 07-34

The Education Audit Appeals Panel has adopted the attached Proposed Decision of the Administrative Law Judge as its Decision relating to Finding 07-34 in the above-entitled matter.

Effective date: October 22, 2012.

IT IS SO ORDERED.

October 22, 2012
Date

Original Signed
David Botelho, Chairperson
for Education Audit Appeals Panel

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Appeal of Fiscal Year
2006-07 Audit Findings 24, 26, 27 and 34 of:

OAKLAND UNIFIED SCHOOL DISTRICT,

Appellant,

Case No. 10-04

OAH No. 2010050766

PROPOSED DECISION ON REMAND

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on January 26-27, 2011, in Oakland, California.

Attorney Gary D. Hori represented State Controller John Chiang.

Deputy Attorney General Sara Kurtz represented the Department of Finance.

N. Eugene Hill, Esq., and Richard Miadich, Esq., Olson, Hagel & Fishburn, LLP, represented appellant Oakland Unified School District (District).

The case was submitted for decision on June 13, 2011. Administrative Law Judge Tompkin issued her proposed decision on July 18, 2011. On October 24, 2011, the Education Audit Appeals Panel (EAAP or Panel) issued an order rejecting the proposed decision and remanding the case for the taking of further evidence (the remand order). (Exhibit 10 in evidence) The remand order states that the Panel seeks evidence as to the duties actually performed by employees in six designations. The remand order further specifies that "the evidence the Panel seeks includes (1) documentation that was created or in use during the audit year which describes the actual duties of the employees (not simply job titles or reference to general language in a collective bargaining agreement); and (2) if needed, testimony by the particular employees whose duties during the 2006-07 school year are in question."

On February 21, 2012, the parties filed a Stipulation Re Random Selection by ALJ of Witnesses for District's Case in Chief on Remand. (Exhibit P in evidence) The stipulation stated that District had identified 51 potential witnesses for its case in chief on remand, and that in order to avoid the necessity of calling all 51 witnesses, the parties requested that the assigned ALJ randomly select a total of 10 witnesses from the following four categories: Category 1: Teachers on Special Assignment based at school sites (4 witnesses); Category 2:

Teacher Instructional Facilitators based at school sites (3 witnesses); Category 3: Teachers on Special Assignment based at the District (2 witnesses); and Category 4: Teacher Instructional Facilitators based at the District (one witness). A random selection of witnesses in accordance with the terms of the stipulation was made on February 23 and orally communicated to the parties. Written confirmation of that selection was made in an order dated March 13, 2012. (Exhibit Q in evidence) Pursuant to the stipulation of the parties, the testimony of the selected witnesses establishes the duties performed during the 2006-07 school year by members of the category of employees of which the witness is a member.

Additional days of hearing were held on May 19-20, 2012. The record was held open to permit briefing by the parties. On May 21, 2012, District filed its opening brief on remand, and the State Controller and Department of Finance filed a joint opening brief on remand. The briefs were marked as Exhibit R and Exhibit 11, respectively, for identification. On June 11, 2012, District filed its reply brief on remand and the Controller and Finance filed a joint reply brief on remand. The briefs were marked as Exhibit S and Exhibit 12, respectively, for identification. The matter was deemed submitted on June 11, 2012.

FACTUAL FINDINGS

1. On June 2, 2003, the legislature enacted Senate Bill No. 39 (2003-2004 Reg. Sess.) (SB 39). SB 39 appropriated \$100,000,000 as an emergency loan to appellant Oakland Unified School District (District), which was experiencing a fiscal emergency. As a condition of District receiving the loan, SB 39 required District to permit the Superintendent of Public Instruction (Superintendent) to assume all rights, duties, and powers of the governing board of District, and to appoint, in consultation with the Alameda County Superintendent of Schools, an administrator to act on behalf of the Superintendent in exercising authority over District. SB 39, section 9, subdivision (d), also required the following:

For the fiscal year in which the loan moneys are disbursed and each fiscal year thereafter, the Controller, or his or her designee, shall cause an audit to be conducted of the books and accounts of the district, *instead of the audit required by Section 41020 of the Education Code. . . .*

(Emphasis added)

2. The Controller of the State of California (Controller) conducted an audit of District for fiscal year 2006-07, during which time District was under the control of the Superintendent. The resulting audit report, which was issued in October 2009, included Audit Findings 24, 26, 27 and 34.

3. Pursuant to Education Code section 41344, District appealed Audit Findings 24, 26, 27 and 34. The audit findings constitute the statement of issues in this case. (Gov. Code, § 11504.)

4. Prior to hearing, the parties reached a stipulated settlement with respect to Audit Findings 24, 26 and 27. On April 11, 2011, the Education Audit Appeals Panel issued a decision adopting the Stipulation and Settlement Agreement between the parties as to Audit Findings 24, 26 and 27. The hearing in this matter was thus limited to the appeal of Audit Finding 34. Audit Finding 34 finds that District inaccurately calculated its administrator-to-teacher ratio and exceeded the maximum allowable number of administrators by 84, resulting in a recommended penalty of \$1,364,832.

5. District has the burden of proving that Audit Finding 34 is based on "errors of fact or interpretation of law." (Ed. Code, § 41344, subd. (d).)

Controller's Authority to Impose Penalties Against District

6. Education Code section 41020 sets forth the requirements for audits of school districts. The purpose of Education Code section 41020 is to encourage sound fiscal management practices among local educational agencies by strengthening fiscal accountability at the district, county and state levels. (Ed. Code, § 401020, subd. (a).) Education Code section 41020 requires that each fiscal year a local educational agency either provide for an audit of the books and accounts of the local educational agency or make arrangements with the superintendent of schools having jurisdiction over that agency to provide for auditing. The format of the audit is determined by the Controller after consultation with the Superintendent and the Director of Finance. (Ed. Code, § 401020, subd. (d).)

The audits must be performed by a certified public accountant or a public accountant selected by the local educational agency from a directory of accountants deemed by the Controller as qualified to conduct audits of local educational agencies. (Ed. Code, § 41020, subd. (f)(1).) Local educational agencies are required to periodically rotate accounting firms. (Ed. Code, § 41020, subd. (f)(2).) Audit reports for school districts must contain a summary of audit exceptions and management improvement recommendations. (Ed. Code, § 41020, subd. (g).) The Superintendent is required to make any adjustments necessary in future apportionments of all state funds to correct any audit exceptions revealed by the audit reports. (Ed. Code, § 41020, subd. (h).)

7. While Education Code section 41020 contains detailed audit requirements for school districts, SB 39 does not. SB 39 simply directs the Controller to conduct an audit of the books and accounts of District, *instead of* the audit required by Education Code section 41020. It provides no guidance regarding the content of the audit and does not expressly authorize adjustments of future apportionments of state funds (i.e., penalties) to correct audit exceptions.

8. District contends that the Controller does not have authority to recommend or require District to pay penalties arising from the audits that SB 39 directs the Controller to conduct. District points out that SB 39 directs the Controller to cause an audit to be conducted *instead of* the audit required by Education Code section 41020 and that SB 39 does not dictate the content of the audit or expressly authorize penalties, which are authorized under Education Code section 41020. District argues that the purpose of the SB 39 audit is to provide information to assist the Superintendent in ensuring District's return to fiscal solvency, and that if the legislature had intended for the Controller to conduct a section 41020 audit and to impose penalties it would simply have directed the Controller to conduct a section 41020 audit. District notes that a section 41020 audit has a different purpose, i.e., to encourage sound fiscal management practices among local educational agencies, than the purpose District advances for SB 39. District also argues that permitting the Controller to impose penalties for Audit Finding 34 would be inconsistent with the purpose of SB 39, which was to return District to fiscal solvency, because it would cause District, which was already in fiscal crisis, to incur further financial hardship for actions taken while District was under state control. District therefore contends that the Controller lacks authority to impose penalties for exceptions occurring while District was under state control and that the recommended penalty for Audit Finding 34 is invalid.

9. The Controller contends that SB 39 does not render the requirements of Education Code section 41020 inapplicable to District. It maintains that the purpose of the "instead of" language in SB 39 is to relieve a financially strapped district from the Education Code section 41020 requirement that each year it hire an independent auditing firm to perform an audit, and to provide an express exception to the Education Code section 41020 requirement of an independent annual audit so that the Controller, rather than an accounting firm, can conduct audits of school districts during the time that they are state-administered. The Controller also points out that the language in SB 39 tracks the language of Education Code section 41320.1, subdivision (d). Section 41320.1, subdivision (d), is contained in a group of Education Code provisions pertaining to school districts receiving emergency apportionments. It similarly directs the Controller to conduct an audit of the fiscally strapped school district "in lieu of" the audit required under section 41020. The Controller notes it has historically audited school districts receiving emergency apportionments based on Education Code section 41020, and that it has audited District pursuant to Education Code section 41020 since the 2003-04 fiscal year, when District received its emergency loan. The Controller also points out that it has broad authority to audit the disbursement of any state money for correctness and legality. (Gov. Code, § 12410; Cal. Const., art. XVI, § 7.) It maintains this authority cannot be abrogated by the Legislature.

10. The Department of Finance (Finance) relies on Education Code sections 41344.1 and 41344 as support for its contention the Controller has authority to recommend or require District to pay penalties. Education Code section 41344.1, subdivision (c), provides that compliance with all legal requirements is a condition to the State's obligation to make apportionments. Under Education Code section 41344, if an audit, which the school district has had an opportunity to respond to in writing, reveals a school district is required to

repay an apportionment based on an audit exception, the Controller is required to withhold or disallow the penalty amount.

11. District has failed to establish that the "instead of" language in SB 39 invalidates the remaining requirements of Education Code section 41020 or that the Controller lacks authority to impose penalties for audit exceptions occurring while a school district is under state control. Nothing in the legislative history of SB 39, the Education Code provisions pertaining to school districts receiving emergency apportionments, or any legal authority cited by District indicates the intent of SB 39 was to deprive the Controller of the authority to recommend or impose penalties.¹ Indeed, such a result is inconsistent with Education Code section 41344.1, which conditions a school district's receipt of state funds on compliance with all legal requirements, and Education Code section 41344, which requires the Controller to withhold penalty amounts that are based on audit exceptions. Recognizing the Controller's authority to recommend or impose penalties for exceptions resulting from audits performed while a school district is under state administration is also consistent with the Controller's broad authority to audit disbursement of state money. Moreover, to adopt District's argument would essentially result in endorsement of mismanagement of state resources because District would not be held accountable for its mismanagement. It is therefore found that the Controller's interpretation of the "instead of" language in SB 39 as simply permitting the Controller, instead of an independent auditing firm, to conduct the annual Education Code section 41020 audit, is the most reasonable interpretation. Such an interpretation relieves the school district in fiscal crisis from having to hire an auditing firm and is consistent with the legislative intent of helping the school district return to fiscal solvency.

Finally, it must be noted that the audit exception at issue in the subject case involves the calculation of administrator to teacher ratios. Education Code section 41407 provides, "Notwithstanding any other provision of law, a school district is subject, with regard to Section 41402 [calculation of administrator to teacher ratios], to audits conducted pursuant to Section 41020." Education Code section 41407 makes clear that calculations of administrator-to-teacher ratios are subject to Education Code section 41020 audits.

Calculation of Administrator to Teacher Ratios

12. State law permits a unified school district to employ eight administrators for every 100 teachers it employs. (Ed. Code, § 41402, subd. (b).) This ratio of administrators to teachers (RAT) is subject to annual audit conducted pursuant to Education Code section 41020. (Ed. Code, § 41407.) The accounting system used for the audit must comply with the California School Accounting Manual (CSAM). (Ed. Code, § 41010.) CSAM classifies categories of employees and assigns an object code for each category. However, the

¹ In contrast SB 39 expressly exempts the Superintendent from complying with certain provisions of the Public Contract Code (SB 39, sec. 5(a)(1)).

Education Code does not require that CSAM object codes be used to classify employees for purposes of a RAT calculation.

13. The Controller conducted an audit of District for fiscal year 2006-07. The Controller's auditors reviewed District's RAT calculations and then sought to verify those calculations.² District's Human Resources Department provided the Controller's auditor with a Salary and Benefits report that contained a list of certificated employees that it had divided into categories using the CSAM object codes. There was a total of 2,857.76 full-time equivalent (FTE) certificated employees.

The Controller's auditor divided the employees into four categories: teachers (Code 1100), pupil services (Code 1200), administrative plus (Code 1300) and administrative (Code 1900). The auditors then deducted certificated employees in the pupil services category, and certificated employees in the administrative category who were paid with federal funds, from the employee total because such employees are not a part of RAT ratio calculations. The certificated employees remaining after the deductions were divided as followed: 2,308.36 Code 1100 teacher FTE and 269.09 Code 1900 administrator FTE. The total number of remaining certificated teacher FTE (2,308.36) was multiplied by 0.08 (or eight percent) to arrive at 184.67, the maximum number of administrator FTE District was permitted to employ without penalty. This maximum number of administrator FTE (184.67) was then deducted from the actual number of administrator FTE employed by District (269.09), resulting in a finding of 84.42 (which was rounded to the nearest whole number - 84) excess administrator FTE employed by District. The excess number of administrators (84) was then multiplied by the average portion of a District administrator's salary paid by the State (\$16,248), resulting in a recommended disallowance or penalty of \$1,364,832.

14. Kenneth Corbridge, who performed the audit on behalf of the Controller, testified that he treated all certificated employees that District classified as Code 1900TCHR as administrators. Corbridge relied upon the definition of teacher contained in Education Code section 40401, statements of an unnamed District employee, the advice of counsel and the California School Accounting Manual (CSAM) in determining who was a teacher.

15. Education Code section 40401, subdivision (d), defines a teacher as follows:

"Teacher" means an employee of a school district, employed in a position requiring certification qualifications, whose duties require him or her to provide direct instruction to pupils in the schools of that district for the full time for which he or she is employed. . . . Instructional preparation time shall be counted as part of the teacher full-time equivalent, including but not limited to, mentor teacher or department chairperson time.

² Both District and the Controller's auditors revised their RAT calculations before arriving at the calculations involved in the subject appeal.

Corbridge testified that he had a conversation with a District employee who told him that District classified employees who did not provide direct student instruction as Code 1900. However, Corbridge did not recall the name of the employee and no reference to the conversation is contained in the working papers for the audit. Corbridge also testified that he was advised by counsel to classify Code 1900 employees as administrators and that he used CSA Manual object codes to classify employees because he felt they were a more accurate indicator of an employee's job duties than a job title. However, Corbridge acknowledged on cross-examination that the Education Code does not require him to use object codes to classify employees. Corbridge also testified that he reviewed a CD provided by District but did not find any source documents for certificated employees that were coded 1900 that would support their classification as teachers.³

16. District contends the Controller improperly classified six categories of certificated employees as administrators when they should have been classified as teachers. The categories at issue are: Teacher If 11 Month-12 Pay, Teacher Inst Facilitator 10 Pay, Teacher Intr Facilitator 12 Pay, Teacher on Special Assign 10 Pay, Teacher on Special Assign 12 Pay and Teacher TSA 11 Month-12 Pay.⁴ District maintains Corbridge erred in relying solely on the fact an employee had been assigned Code 1900 in classifying the employee as an administrator. It contends the CSAM object codes indicate how District classified the expenditures made for an employee and that there is no evidence District intended that the CSAM object codes be used in the RAT calculation. District maintains that Education Code section 41401, which defines the terms "administrator" and "teacher" by detailing their job duties, requires the Controller's auditor to research and rely upon the duties of the employees in its RAT calculation, and that the failure of the Controller's auditor to evaluate job duties resulted in the erroneous classification of the employees in the disputed classes.

17. For the last 10 years Arlene Matsuura has been employed by the California Department of Education, which provides guidance to school districts on how to do audit reports. Matsuura is employed in the audit resolution division. Matsuura testified that paragraph D (which is captioned Teachers) of Part I of the Specific Instructions contained in the packet of suggested audit procedures that is provided by the Department of Education to

³ Although Corbridge reviewed District's master schedule by teacher and period, monthly attendance reports, classroom teacher attendance accounting programs, class absence summary documents, scantron attendance reporting forms and course enrollment histories, all of which would have provided information on which teachers were assigned to teach or mentor a class, he testified did not rely upon these documents in classifying the employees.

⁴ The evidence presented at hearing indicates that the teachers within these classifications were all teachers on special assignment.

school districts, states that the classification of "teacher" should include "teachers released from the classroom for a portion of the day to develop curriculum, act as mentor teachers, or serve as department chairpersons." Matsuura testified an employee's classification should be based on his or her duties and she opined that a mentor teacher should be classified as a teacher for purposes of the RAT calculation.

Matsuura further testified that the Department of Education advises school districts to use CBEDS (a data collection system) as a reference tool to classify employees, but does not require school districts to use CBEDS. Matsuura explained that CBEDS differs from CSAM in that CBEDS is a data collection system and the CSAM is used to classify employees for accounting purposes. She explained that while the CSAM is useful to identify a funding source, CSAM 1900 object codes cannot be relied upon exclusively to determine whether an employee is an administrator or teacher for purposes of the RAT calculation; a person who is classified as Code 1900 under CSAM for accounting purposes, might or might not be a teacher for purposes of the RAT calculation. Matsuura also noted that school districts frequently misuse Code 1900, which should rarely be used. Code 1900 is thus not determinative of an employee's classification for purposes of the RAT calculation and a review of the employee's duties must be undertaken. If an employee's duties included providing some instruction to students, including demonstration instruction, and some mentoring, Matsuura would advise the school district to classify the employee as a teacher for purposes of the RAT calculation. She would give the same advice even if a certificated employee was not assigned a specific classroom and worked exclusively as a mentor teacher. This opinion appears to be based, at least in part, on the definition of "administrative employee" contained in the 2006 edition of CBEDS. That definition, which is contained in the Glossary of Terms section on page 7, states, "This category does not include mentor teachers, who are to be reported as teachers. ([Ed. Code, §] 44496.)" Education Code section 44496 expressly provided that mentor teachers were to be classified as teachers for purposes of the RAT calculation. However, Education Code section 44496 was repealed in 2001. The legislative history of section 4496 indicates the Mentor Teacher Program was to be replaced by the Peer Review and Assistance Program. And Education Code section 44503 of the Education Code was amended to provide that a school district that accepted state funds for a peer assistance program had to negotiate the development and implementation of the program with the employees' bargaining representative. Subdivision (b) of section 44503 provides that peer assistance provided through the program does not constitute management or supervisory functions.

18. Matsuura provided guidance to District regarding preparing District's RAT calculations, and she reviewed District's RAT calculations.⁵ Based on her review and on what she was told by District about the disputed positions, she believes District properly classified the disputed positions as teachers for purposes of the RAT calculation. However, Matsuura admitted on cross-examination that she did not personally investigate the duties of each disputed classification.

⁵ Matsuura did not audit the numbers. She only looked at methodology, i.e., she only looked at the explanation of classifications used and where to place the classifications.

19. Troy Christmas is the Director of Labor Management and Employee Relations for District. He negotiates all labor agreements for District. Section 12.12.6 of the Memorandum of Understanding (MOU) that was in effect during the 2006-07 school year provides "All TSAs [teachers on special assignments] shall work at least eighty percent (80%) of their work assignment time with students or in some teacher support role." Christmas testified that TSA's are credentialed teachers who mentor and help train other teachers. Under the terms of the MOU, TSA's would not be permitted to provide administrative services. Christmas did not receive any complaints of TSA's working out of classification during the 2006-07 school year. Christmas therefore concluded that the TSA's were all performing the duties of teachers or teacher support, including lesson plan development, coaching, mentoring and facilitating. Christmas acknowledged on cross-examination that all of a TSA's duties could involve only teacher support and that the TSA might not have a classroom of his or her own.

20. Marrecio Coleman is the Accounting Manager for District and is responsible for preparing District's RAT calculation. Prior to preparing the RAT calculation for District Coleman consulted various resources, including the Education Code, Department of Education materials and personnel, District's Human Resources Department and other District personnel. Coleman used the same data he provided to the Controller to prepare District's RAT calculation. Coleman explained that Code 1900TCHR is "a catchall bucket code" that District uses for employees who are not clearly K-12 teachers or who do not have their own classroom assigned to them.

Coleman testified that when he prepared District's RAT calculation he took a conservative approach. Any TSA who was classified as a Code 1900TCHR and was assigned to a school site (but not a specific classroom) was classified as a teacher for purposes of the RAT calculation. This classification was based on the position description (title) - teacher, the fact the TSA's were assigned to school sites, and conversations with District administrators and supervisors, who told Coleman that the duties of TSA's located at school sites included interacting with and providing direct instruction to pupils, mentoring other teachers and providing classroom support. Coleman classified TSA's who were classified as Code 1900TCHR but were assigned to sites other than school sites as administrators. This resulted in Coleman finding that District had 32 more administrators than allowed within the disputed classifications and a corresponding RAT penalty of \$552,352.08.

21. The evidence established that the Controller's auditor erred in relying almost exclusively on the CSAM object codes to classify employees within the disputed classifications. The purpose of CSAM object codes is to classify employees for accounting purposes; a person classified as Code 1900 under CSAM for accounting purposes, might or might not be a teacher for purposes of a RAT calculation. The Education Code classifies administrators and teachers based on their duties for purposes of the RAT calculation. Therefore, the classifications used by the Controller's auditor also should have been based on job duties and not only CSAM object codes. However, during the audit District failed to

provide the Controller's auditor with the supporting information necessary to classify employees based on job duties. And at the original hearing in this matter there was little documentation, other than the MOU, of the duties TSA's actually performed. No teacher in the disputed categories provided testimony regarding his or her job duties at the original hearing.

22. On remand testimonial evidence was provided by 10 randomly selected witnesses regarding the duties performed by TSA's and Teacher Instructional Facilitators (TIF's) in the four categories set forth below.⁶ Pursuant to the stipulation of the parties, "the testimony by the ten randomly selected witnesses about the duties performed during the 2006-07 school year shall establish the duties performed during the 2006-07 school year by all members of the category of employees of which the witness is a member."

I. TSA'S BASED AT SCHOOL SITES (4 WITNESSES)

a. Katherine Bynum has been a teacher for 34 years and is currently employed as a Special Education teacher with District. During the 2006-07 school year she was a TSA at Lockwood Elementary School. Her primary role was as a mentor to less experienced teachers. Bynum did not evaluate the teachers but simply provided coaching and feedback about teacher performance to help teachers enhance their teaching skills. Bynum worked in the classroom five days per week. While in the classroom, Bynum provided instruction to students three-to-five hours per day, four days per week. She would often teach the lesson to demonstrate or model teaching techniques for the classroom teacher. Bynum estimates she provided 24 to 25 hours per week of instruction. During a teacher's conference period, she would meet with the teacher to provide feedback, discuss best practices for math and reading and assist in preparing lesson plans. After the conference period, she would help students who needed assistance and otherwise assist the teacher as needed. She also gave testing, provided small group instruction, and supervised children in the cafeteria and play yard.

b. Elena Aguilar works for District as a leadership coach. During the 2006-07 school year she was employed as a TSA assigned to the Ascend School site. As a TSA she provided direct instruction to sixth, seventh and eight students 80 percent of the time. She had her own classroom and taught three hours per day, four days a week. She provided instruction in life skills, media literacy and reading comprehension. On the fifth day Aguilar coached teachers (which included meeting one-on-one to review lesson plans and doing classroom observations) and led professional development. Aguilar considered herself a

⁶ On remand the parties stipulated that six of the 93 District employees the Controller's auditor had previously classified as administrators would be reclassified as teachers based on documents produced by District to the Controller and Finance. The remaining 87 employees were divided into four categories – 44 school site based TSA's, 18 school site based TIF's, 20 District based TSA's and 5 District based TIF's. Only 51 of the 87 employees were available to testify. The parties stipulated that rather than having all 51 witnesses testify, a proportionate number of employees from each group would testify.

mentor to the teachers she coached. Aguilar was not an administrator and did not have any administrative duties.

c. Suki Jones Mozenter has been employed by District for approximately 18 years. During the 2006-07 school year she worked as a Guided Language Acquisition Design (GLAD) coach assigned to Bridges Academy at Melrose, an elementary school. She provided instruction to students through demonstration teaching and one-on-one instruction. The balance of her time was spent supporting teachers. This included meeting with the teachers, helping the teachers prepare lesson materials, answering questions, and observing teachers teach, then providing feedback

d. Mary Jo Schneider began working for District in 2002. During the 2006-07 school year she was a TSA for the community based program, Adults with Disabilities. Her primary responsibility was to visit teachers at 17 different sites and provide curriculum support to the teachers. Schneider visited teachers to observe the classroom setting and see what the teachers needed to augment their instruction. Schneider never supervised, managed or evaluated other teachers. Her role was to support the teachers. Schneider did not provide direct instruction to students. Schneider's office was at Pleasant Valley Adult School. She was at her office daily. She visited school sites one to two days per month, but spent most days in her office primarily doing research on the internet to try to find curriculum to meet the needs of the adults with disabilities. Locating resources for the teachers and students was a large part of her job because there is not a lot available for adult learners with disabilities. Schneider also occasionally wrote curriculums.

II. TIF'S BASED AT SCHOOL SITES (3 WITNESSES)

a. Ronald Mark has taught at District since 1981. He does not possess an administrator credential and has never been an administrator. During the 2006-2007 school year he was a Reading First Program coach at Franklin Elementary School. He demonstrated lessons from the core language arts curriculum in front of students and the classroom teacher. Language Arts is typically taught in the morning, so Mark was continuously in the classroom for the first half of the day. He typically worked with up to five teachers per day. Mark served as a resource for the teachers with whom he interacted, which included observing teachers teach and answering questions about the reading curriculum.

b. Jane Taylor was an employee of District for 34 years before retiring in June 2008. During the 2006-07 school year, Taylor served as a literary coach at Manzanita Community School, an elementary school. As a literary coach, Taylor provided support to teachers and students. She was in the classroom one to two hours per day on a daily basis. Taylor helped teachers implement the Open Court Reading Program. She would often model how to teach the reading program, sometimes teaching the whole class while the teacher watched. Taylor estimates she provided direct student instruction at least 20 minutes per day. Taylor also assisted teachers by doing reading groups, literary circles and English Language Development pull-out groups with students, helping make lesson plans, and conducting pre-class and post-class meetings with teachers. When Taylor was not in the

classroom she did testing, organized tests, tabulated tests scores and made sure the right materials, course books and other materials were available to teachers.

c. Brett Wayne Tankersley was employed by District as a Reading First Coach at Emerson Elementary School. Although he possessed an administrative credential, it was not required for his job. Tankersley model taught lessons before teachers and students, engaged in elbow teaching,⁷ and observed teachers teach, then provided feedback afterwards. He also worked with teachers to plan lessons and provided professional development on minimum days. Tankersley was typically in a classroom each day for a three-hour block during which he either model or elbow taught, or observed teachers teaching and provided feedback. Tankersley estimates that through elbow teaching and model teaching he provided 20 minutes to an hour and one-half of daily instruction to students. Tankersley never supervised, managed or evaluated other staff.

III. TSA'S BASED AT THE DISTRICT (2 WITNESSES)

a. William Eric Swihart has been employed by District since 2002. During the 2006-07 school year he was employed as a TSA in District's music department. Swihart taught music at two elementary schools, Thornhill and Crocker Highlands for 70 percent of his workweek. At Thornhill and Crocker Highlands he taught small groups of students for 30 to 45 minutes per group. He provided instruction to eight to ten classes a day. When he was not providing instruction at Thornhill or Crocker Highlands, Swihart provided coaching and support to other elementary school music education teachers. Coaching typically involved classroom observation and feedback, modeling lessons for teachers (with students present), and presenting professional development workshops twice a month. He also assisted other teachers organize their curricula, did music inventory with other teachers and wrote the music curriculum. Swihart characterized his job as structuring the learning experience to help teachers grow as professionals. Swihart never managed or supervised other teachers.

b. Robin Shryl Thompson-Webb has worked at District for over 28 years. During the 2006-07 school year she was employed as a TSA in the School to Career (STC) program, which is part of District's Career Technical Education department. STC is a type of service learning vocational program in which the students explore career opportunities through working on jobs, and participating in workshops, job shadowing, internships and related activities. Thompson-Webb worked on career education with high school, middle school and, occasionally, elementary school students, but her main focus was high school students. She worked at multiple school sites. During the 2006-07 school year Thompson-Webb's duties included recruiting students to the STC program, job development (securing jobs where students could work for the summer), conducting twice monthly career

⁷ Elbow teaching is a form of team teaching during which an experienced teacher teaches a lesson with the classroom teacher. The person teaching switches back and forth during the lesson at predetermined points.

development workshops for students, conducting monthly staff development workshops for teachers, chaperoning students on field trips to potential work sites, and visiting students at their placements to monitor their progress. Thompson-Webb also spent a great deal of time working with teachers and principals to help them put together their program plans and budgets, locate resources and secure speakers, all with the objective of enhancing the STC program for the students. She also responded to employer and parent calls regarding students. Thompson-Webb did not manage, supervise or evaluate other teachers. Although Thompson-Webb possessed an administrative credential, the credential was not required for her position.

IV. TIF'S BASED AT THE DISTRICT (ONE WITNESS)

Marisol Arkin has been a District employee for 13 years. During the 2006-07 school year she was a TIF⁸ math content coach assigned to multiple (five or six) school sites. As a math coach Arkin worked with individual teachers as well as groups of teachers. She was typically in the classroom all day. At the beginning of the year Arkin did elbow teaching. As the year progressed, she did less elbow teaching and more observation of teachers, followed by debriefing and notes for improvement. On minimum days, Arkin provided professional development or led group professional development meetings. She also met with teachers during their prep periods to talk about lessons and lesson planning. Arkin described her job as primarily a coaching relationship designed to empower the teachers and allow them to learn, while having a safety net. Arkin did not manage, supervise or evaluate other teachers. Although Arkin possessed an administrative credential, the credential was not required for her position.

23. Only testimonial evidence was presented at the hearing on remand. That testimony established that only experienced teachers were selected as TSA's and TIF's. The primary role of the TSA's and TIF's was to support or mentor other teachers and to help the teachers improve as instructors. All of the positions, with the exception of that of Mary Jo Schneider, included instruction to students (usually through model or team teaching), or working directly with students to advance the educational curriculum. (For example, Robin Thompson-Webb provided curriculum related instruction to students by regularly leading career development workshops, taking students on field trips to potential work sites, and monitoring the progress of students at their worksites.) Schneider's position focused on supporting teachers through locating hard to find resources.

24. The testimony also established that during the 2006-07 school year, all of the witnesses were members of the teacher's union. None of the witnesses served as an administrator. None of the witnesses was a member of the administrator's union. An administrative credential was not required for any of the TSA or TIF positions at issue.

⁸ Arkin testified she had worked at District as both a TIF and a TSA, and that the duties of both positions were the same.

Teacher Defined

25. The Controller and Finance contend that the witnesses do not meet the definition of a teacher. Citing the definition of a teacher contained in Education Code section 41011, and a statement in EAAP's order on remand that they interpret as approving use of the CSAM codes for calculating the RAT ratio, the Controller and Finance argue that in order to be classified as a teacher, an employee must provide at least one full instructional period each school day that the person is employed. They further contend that it is only after this requirement is satisfied, that time associated with instructional preparation and/or mentor teaching may be classified as part of a teacher's workday.

26. Education Code section 41011 provides in pertinent part:

The accounting system used to record the financial affairs of any school district shall be designed to provide separate recording and clear distinction between expenditures for salaries of classroom teachers employed by the district and expenditures for other purposes of the district. . . .

... [¶]

As used in this section a "teacher" means an employee of the district employed in a position requiring certification qualifications and whose duties require him to teach pupils of the district for at least one full instructional period each school day for which the employee is employed. In the case of a teacher employed to teach in an elementary school, an instructional period is a period of not less than 20 minutes. In the case of a teacher employed to teach in secondary school, an instructional period is the number of minutes equal to the number of minutes of the regular academic period in the junior high school, or high school, in which the teacher is employed to teach.

As relevant here, the EAAP remand order states:

The definitions for classifying the employee full-time equivalent (FTE) for purposes of CSAM are nearly identical to those in Education Code section 41401 for the administrative employee to teacher ratio. There is no prohibition on using the CSAM classifications as a source for the staffing information for calculating the administrative employee to teacher ratio. The District-assigned CSAM codes . . . were reflected in District's own calculation of its administrative employee to teacher ratio. [However] The Panel does not seek further evidence or hearing on the suitability of the Controller's use of the CSAM codes as a source for the staffing information.

27. District disputes the Controller and Finance's definition of teacher. It argues that their reliance on Education Code section 41011 and the CSAM for the proposition that a teacher must provide instruction for at least one full-instructional period each school day is misplaced. District argues that the definition of teacher contained in section 41011 is limited to that section, which defines teachers in the context of how CSAM should account for salaries of classroom teachers, and that the portion of the CSMA relied upon by the Controller and Finance to support their definition of teacher merely mirrors the requirements of section 41011.

District further contends that Education Code section 41401 sets forth the controlling definition of a teacher for purposes of calculating the RAT ratio. District interprets section 41401 as requiring that direct instruction be part of a teacher's teaching duties, but as also allowing instructional preparation and mentoring to count as teaching time. District maintains that nine of its ten witnesses meet the definition of teacher set forth in Education Code section 41401 and that the one who does not (Mary Jo Schneider) is in substantial compliance with the RAT requirement. Pursuant to Education Code section 41344.1, substantial compliance may be found if there is "nearly complete satisfaction of all material requirements of a funding program that provide an educational benefit substantially consistent with the purpose of the program." District notes that the intent of the Legislature in limiting the RAT was to (1) maximize the allocation of existing resources, (2) discourage the growth of bureaucracy in the public schools, and (3) emphasize the importance and significance of the classroom teacher. (Ed. Code, § 41400.) District argues that Schneider's duties as a TSA were consistent with legislative intent regarding the RAT. District points out that (1) the TSA and TIF positions emphasized the importance of the classroom teacher because, as each witness, including Schneider, testified, a primary function of his or her position was to support the classroom teacher and help the teacher enhance his or her teaching skills, (2) the growth of bureaucracy was discouraged because none of the disputed employees supervised, managed or evaluated other teachers or staff, and thus were not part of the bureaucracy, and (3) the roles of mentor teachers could be viewed as maximizing resources in that the employees were being used to efficiently and effectively support the improvement of student instruction.

28. Education Code section 41401, subdivision (d), sets forth the definition of a teacher for purposes of the RAT calculation. It defines a teacher as a certificated employee who provides direct instruction to pupils full-time; but it also provides that mentor teaching may be classified as part of the teacher's full-time equivalent. Section 41401 thus recognizes that mentor teaching constitutes a teaching duty. Nothing in Education Code section 41401, subdivision (d), imposes a requirement that a teacher provide at least one period of instruction a day. And nothing in section 41401 limits mentor teaching to only a part of a teacher's workday. The legal authority cited by the Controller and Finance does not require that such limitations be added to section 41401. Education Code section 41011 defines the term teacher in the context of classifying employees for accounting purposes, and its definition is limited to that section. The CSMA similarly relates to school district accounting practices.

Interpreting Education Code section 41401 broadly to permit mentor teaching as a significant part of a teacher's FTE is consistent with past practice. Up until 2001, Education Code section 44496 expressly provided that mentor teachers were to be classified as teachers for purposes of the RAT calculation. Even upon the repeal of Education Code section 44496, legislation was passed to encourage mentor (or peer assistance) teaching as a means of improving classroom instruction. In addition, during the 2006-07 fiscal year, the Department of Education, which provides guidance to school district on how to do audit reports, defined mentor teachers as teachers for purposes of the RAT calculations. A primary purpose of the RAT calculation is to emphasize the importance and significance of the classroom teacher. (Ed. Code, § 41400.) Recognizing employees for whom mentor teaching and/or instructional support is a significant part of their duties as teachers for purposes of RAT calculations is consistent with and advances this goal. All of the foregoing indicates a consistent and historical recognition of mentor teachers as teachers for purposes of the RAT calculation. It is therefore found that a certificated employee may be classified as a teacher even if a significant part of his or her FTE consists of mentor teaching and/or instructional support if the employee also provides direct pupil instruction as part of his or her full-time teaching duties.

29. In the subject case, the evidence establishes that nine of District's witnesses satisfy the definition of teacher set forth in Education Code section 41401, in that the nine witnesses all provide direct instruction to pupils with the balance of their time being spent in mentoring or instructional support. Witness Schneider did not provide any student instruction as a TSA. However, District persuasively argues that Schneider's duties as a TSA were consistent with legislative intent regarding the RAT in that they recognized the importance of the classroom teacher, discouraged additional bureaucracy and maximized the use of resources. It is therefore found that Schneider's characterization as a teacher is in compliance with the requirements of the RAT. Accordingly, all of the employees within the categories represented by District's 10 witnesses must be classified as teachers.

Sufficiency of the Testimonial Evidence

30. The Controller and Finance also argue that the testimony of District's ten witnesses must be discounted, and given little if any weight, because it is not supported by documentation. They point out that Education Code section 35250, requires a school district to keep an accurate record of receipts and expenditures and maintain records and reports as required by law, and that the California Code of Regulations requires school districts to maintain detailed records basic to any audit. (Cal. Code Regs., tit. 5, §§ 16025 & 16026.) They also cite to the Internal Revenue Service Manual (§ 7, Issue Resolution, 4.10.7.3.2, Oral Testimony), which provides guidelines for considering oral testimony. Those guidelines indicate that documentary evidence should be relied upon instead of oral testimony when documentary evidence is available. Based primarily on the above authority, the Controller and Finance argue that where specific recordkeeping is required by law, oral testimony alone should not be substituted for written documents, or used in lieu of available documentary evidence. The Controller and Finance identify various documents they contend

are available or should be available to establish the duties of the disputed employees,⁹ and then argue that District should not be permitted to use testimony in lieu of these documents. Lastly, the Controller and Finance argue that a "finding that oral testimony alone is adequate will undermine the procedures established in EAAP's Audit Guidelines to determine audit findings for improper expenditures of state funds because it would allow school districts to flaunt the statutory requirements for record-keeping."

District maintains the witness testimony is sufficient to establish the duties of the disputed employees. It notes that the EAAP order explicitly permitted District to submit oral evidence (employee testimony) "if needed", and that the parties explicitly agreed in their stipulation that the witness testimony would reflect the duties of all disputed employees. District also notes that the Administrative Procedures Act (APA), which governs the proceedings in this case, permits oral evidence and that there is nothing in the APA that indicates such evidence is insufficient to support a finding or that less weight is to be given to such evidence. Finally, District argues the witness testimony should be accepted as true because no contrary evidence was presented by Controller or Finance.

31. The Controller and Finance failed to establish that the testimony of the 10 witnesses regarding their duties as TSAs and TIFs should be disregarded because it is not supported by documents. They cite no legal authority that requires such a result. Moreover, such a result is inconsistent with the EAAP remand order, which clearly authorized consideration of employee testimony, and inconsistent with the stipulation of the parties that the testimony of the selected witnesses would establish the duties performed during the 2006-07 school year by members of the category of employees of which the witness is a member. Nor is the Controller and Finance's contention that a finding in District's favor based solely on testimonial evidence will undermine the audit process persuasive. Permitting District to provide testimonial evidence to establish that it properly classified the disputed employees as teachers does not relieve District of its obligation to comply with audit requirements; instead it simply provides another avenue to offer proof of compliance.

RAT Calculation

32. The Controller's auditor found that District was employing 84 FTE of excess administrators. On remand, District only disputed the classification of 93 employees, who represent 62.44 FTE administrator positions. The Controller agreed to reclassify six of the disputed employees, representing 4.05 FTE, from administrators to teachers. As set forth in Factual Finding 29 above, the remaining 87 disputed employees, who represent 58.39 FTE, are determined to be teachers or in substantial compliance with the definition of a teacher. Therefore, a total of 62.44 teacher FTE (4.05 plus 58.39) must be included in the teacher

⁹ Apparently, the types of documents cited by the Controller and Finance were produced by District to support the reclassification of six employees, who were initially identified by the Controller's auditor as administrators, from administrators to teachers. None of these documents was produced at hearing or otherwise made a part of the record.

category. This reclassification results in District's teacher FTE being revised upward to 2,370.80 (2,308.36 plus 62.44), and its administrator FTE being revised downward to 206.65 (269.09 less 62.44). The teacher FTE of 2,370.80 is then multiplied by .08 to arrive at 189.664, the maximum number of administrators District is permitted to employ without penalty. This maximum number of administrators (189.664) is then deducted from the actual number of administrators employed by District (206.65) leaving 16.986 (which is rounded to the nearest whole number of 17) of excess administrator FTE. The excess number of administrator FTE (17) is then multiplied by the average portion of a District administrator's salary paid by the State (\$16,248), resulting in a penalty of \$276,216. District concedes that the \$276,216 penalty is correct and requests a reduction of the recommended penalty of \$1,364,832 to this amount. Its request is granted.

LEGAL CONCLUSION

District has met its burden of proof. District has proven that 62.44 teacher FTE were erroneously classified by the Controller's auditor as administrator FTE. Cause therefore exists to adjust the recommended penalty from \$1,364,832, to \$276,216, as requested by District.

ORDER

The appeal of Oakland Unified School District from Audit Finding 34 is granted. The assessed penalty is reduced to \$276,216.

DATED: September 6, 2012

Original Signed

CHERYL R. TOMPKIN

Administrative Law Judge

Office of Administrative Hearings